

Insurance Commissioner
ACCEPTED SOP

MAR 15 2019

TIME: 8 pm

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

J R HAYES & SONS, INC., a Washington
Corporation,

Plaintiff,

v.

COLONY INSURANCE COMPANY, a non-
admitted insurance company headquartered in
Virginia,

Defendant.

No. 19-2-07462-15EA

**COMPLAINT FOR BREACH OF
CONTRACT, DECLARATORY
JUDGEMENT AND EXTRA
CONTRACTUAL CLAIMS**

Plaintiff J R Hayes & Sons, Inc., ("J R Hayes") by and through its attorneys, Foster Pepper PLLC, submit this complaint for declaratory relief and damages against Defendant Colony Insurance Company ("Colony") and allege:

PARTIES

1. Plaintiff J R Hayes is a Washington corporation qualified to do business in the State of Washington with its registered agent located in King County, Washington.

2. Defendant Colony Insurance Company is either a surplus lines carrier or otherwise non-admitted carrier headquartered in the state of Virginia. Colony issued an insurance contract insuring entities in King County, Washington and failed to respond to a request for insurance from its insured for coverage for an accident that arose in King County, Washington.

COMPLAINT - 1

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JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to, among other things, RCW 7.24.010 and .030 because this action presents a justiciable controversy between the parties regarding Colony's obligations to J R Hayes under an insurance policy. This is an actual and existing dispute within the meaning of Chapter 7.24 RCW, between parties with genuine and opposing interests which are direct and substantial, a judicial determination of which will be final and conclusive.

4. This Court has personal jurisdiction over Colony pursuant to RCW 4.28.185 because Colony contracted to insure J R Hayes, J R Hayes resided in King County, Washington at all relevant times, and Colony has failed to respond to J R Hayes' request for defense and indemnity under the policy.

5. Venue for this action properly lies in this Court pursuant to RCW 48.05.220 because Colony contracted to insure J R Hayes which has resided in King County, Washington at all relevant times, and failed to respond to J R Hayes' request for defense and indemnity under the policy.

BACKGROUND

6. On June 16, 2015, Colony entered into a Commercial General Liability insurance contract (the "Policy") with Kulchin Foundation Drilling Company ("Kulchin") bearing Policy No. 103GL000447904. The Policy includes a blanket "Additional Insured" endorsement, form no. U462-0310. This Additional Insured endorsement extends commercial general liability coverage to "all persons or organizations as required by written contract with the insured." The Policy also includes a "Primary and Non-Contributing Insurance-Third Party" endorsement, form U407-0707, which specifies that with respect to any designated Third Party, the insurance provided by the Policy shall be primary and non-contributing insurance.

1 7. On or about October 15, 2015, an authorized representative of Kulchin signed a
2 Subcontract Agreement with J R Hayes for Project No. 14011 (the "Subcontract") committing
3 itself to all the contract terms for the project, and describing the work as Solider Pile/Soil Nail
4 Wall Construction. The site for the work to be performed by Kulchin under the Subcontract was
5 located in King County, Washington.

6 8. The Subcontract, at Article 5, provides that J R Hayes must be named as an additional
7 insured on Kulchin's general liability policy and that Kulchin's general liability policy be
8 primary insurance.

9 9. Kulchin provided J R Hayes a copy of a Certificate of Liability Insurance stating that
10 J R Hayes is named as an additional insured per written contract or agreement.

11 10. Kulchin provided J R Hayes a copy of the Additional Insured endorsement, form
12 U462-0310, bearing Policy No. 103GL000447904, which provides that all persons or
13 organizations required by written contract with the Named Insured are covered as Additional
14 Insureds under the Policy.

15 11. Kulchin also provided J R Hayes a copy of the Primary and Non-Contributing
16 Insurance form U407-0707, bearing Policy No. 103GL000447904, showing that J R Hayes was a
17 designated "Third Party to whom this endorsement applies."

18 12. In October 2015, Kulchin began installing the soldier pile wall under the
19 Subcontract.

20 13. On or about November 13, 2015, a landslide (the "Landslide") occurred in close
21 proximity to where Kulchin was performing its work under the Subcontract for J R Hayes.

22 14. Nearly three years later, on October 1, 2018, ORA Talus 90, LLC and Resmark
23 Equity Partners, LLC ("Third Party Plaintiffs") filed a Third Party Complaint For: Contractual
24 Indemnity; Implied Indemnity; Common Law Indemnity; and Negligent Damage to Property
25 ("Third Party Complaint") against J R Hayes and other parties in the Western District of
26 Washington. This Third Party Complaint was later amended on October 29, 2018.

15. The Third Party Complaint alleges inter alia that the Third Party Plaintiffs were being sued by the City of Issaquah for the Landslide, and that if the Third Party Plaintiffs have any liability to the City of Issaquah, then J R Hayes is responsible and liable to the Third Party Plaintiffs.

16. On October 12, 2018, J R Hayes sent a letter entitled "Notice and tender of lawsuit against Additional Insured J R Hayes & Sons, Inc., for defense and indemnity" to the Claims Department of Colony. This letter informed Colony of the claims against J R Hayes, provided a copy of the Third Party Complaint, and requested defense and indemnity under the Policy.

17. On December 18, 2018, J R Hayes called and emailed the assigned claims representative at Colony to demand a response to the tender letter from October 1, 2018.

18. On February 5, 2019, J R Hayes sent another letter to Colony re-tendering the demand for defense for the Third Party Complaint and providing the statutorily required notice of an Insurance Fair Conduct Act claim.

19. As of the date of this filing, Colony has not responded to J R Hayes' tenders or IFCA notice.

CAUSES OF ACTION

I. BREACH OF CONTRACT

20. Incorporation: J R Hayes incorporates herein by reference so much of the other portions of this Complaint as is not inconsistent with this cause of action.

21. J R Hayes is an Additional Insured under the Policy and is and was entitled to a defense from Colony to the claims asserted against J R Hayes in the Third Party Complaint.

22. Colony has breached the Policy by failing to defend J R Hayes.

23. J R Hayes has been and continues to be damaged by Colony's breach of the Policy.

II. DECLARATORY JUDGMENT

24. Incorporation: J R Hayes incorporates herein by reference so much of the other portions of this Complaint as is not inconsistent with this cause of action.

25. There is a justiciable controversy between J R Hayes and Colony regarding whether the Policy insures J R Hayes for the allegations asserted against it in the Third Party Complaint.

26. J R Hayes is entitled to a declaratory judgment that it is an insured under the Policy and is and was entitled to a defense under the Policy to the claims asserted against it in the Third Party Complaint.

27. J R Hayes is entitled to a declaratory judgment that Colony has breached its obligations under the Policy to defend J R Hayes from the allegations and claims asserted in the Third Party Complaint.

III. EXTRA CONTRACTUAL CLAIMS

28. Incorporation: J R Hayes incorporates herein by reference so much of the other portions of this Complaint as is not inconsistent with this cause of action.

29. By failing to defend J R Hayes from the allegations and claims asserted in the Third Party Complaint, Colony has violated the Consumer Protection Act, committed Bad Faith, and has violated the Insurance Fair Conduct Act as alleged below.

30. Consumer Protection Act ("CPA"): Colony's issuance of insurance for and handling of insurance claims in Washington constitutes trade or commerce that impacts the public interest. 19.86.010; *Indus. Indem. Co. v. Kallevig*, 114 Wn. 2d 907, 922, 792 P.2d 520 (1990). Colony has committed unfair and deceptive acts and practices in violation of RCW 19.86, including RCW 48.30.015, WAC 284-30-330(2) and (3) and WAC 284-30-370.

31. Insurance Bad Faith: Colony failed to act in good faith by not responding to J R Hayes' tenders and communications and by failing to provide a defense to J R Hayes. Colony's lack of response violated applicable claims handling regulations and laws constituting bad faith

under applicable insurance law, including RCW 48.30.015, WAC 284-30-330, and WAC 284-30-370.

32. Insurance Fair Conduct Act ("IFCA"): Colony acted unreasonably and violated the statutes and regulations incorporated in IFCA, including RCW 48.30.010, RCW 48.30.015, and WAC 284-30-330. J R Hayes gave Colony and the Washington Office of the Insurance Commissioner notice of its intent to file suit under IFCA more than 20 calendar days prior to filing this complaint as required under RCW 48.30.015(8). Colony has not cured its various violations set forth in that notice.

33. Damages: J R Hayes has suffered damages as a direct and proximate result of Colony's violation of the CPA, Colony's bad faith actions, and Colony's violation of IFCA and J R Hayes is entitled to recover damages from Colony, including but not limited to all amounts properly owed under the Policy, damages for the tort of bad faith, treble damages under IFCA, and attorney fees and expenses to the full extent allowed by law.

PRAYER FOR RELIEF

J R Hayes requests the following relief from this Court:

1. A declaration that J R Hayes is entitled to insurance coverage under the Policy;
2. A declaration that Colony had and has a duty to defend J R Hayes in response to the allegations and claims asserted against J R Hayes in the Third Party Complaint;
3. A declaration that Colony breached the Policy by refusing to defend or respond to J R Hayes's communications regarding the Third Party Complaint ;
4. A declaration that Colony violated the CPA;
5. A declaration that Colony acted in bad faith;
6. A declaration that Colony violated IFCA;
7. A judgment in favor of Plaintiff for any and all fees, costs and expenses associated with J R Hayes' defense of the Third Party Complaint;
8. And that such amount immediately above be trebled pursuant to IFCA;

1 9. Judgment in favor of J R Hayes for attorneys' fees, costs and expenses associated
2 with this lawsuit, to the full extent allowed by law;

3 10. Prejudgment and post-judgment interest on the above amounts to the full extent
4 allowed by law;

5 11. Permission to amend this Complaint to conform to proof obtained through
6 discovery and trial; and

7 12. Such other relief as this Court deems just and equitable.
8

9 DATED this 15th day of March, 2019.
10

11 s/ Jack Zahner

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COMPLAINT - 7

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